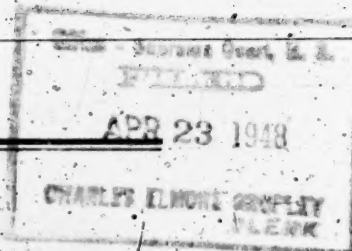




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# Supreme Court of the United States

October Term, 1947.

No. 542.

FRANK TOWNSEND,

*Petitioner,*

vs.

C. J. BURKE, Warden, Eastern State Penitentiary,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
COMMONWEALTH OF PENNSYLVANIA.

## Brief for the Respondent

FRANKLIN E. BARR,  
*First Assistant District Attorney.*  
JOHN H. MAURER,  
*District Attorney of Philadel-*  
*phia County,*  
666 City Hall,  
Philadelphia, Pa.,  
*Attorney for Respondent.*



## INDEX

	PAGE
Respondent's Statement of the Case .....	1
Summary of Argument .....	3
Argument .....	5
I. Indictments, Confessions and Pleas .....	5
II. Who are the defendants? .....	7
III. Due Process of Law .....	7

## CASES CITED

Betts vs. Brady, 316 United States 455 .....	8
Brown v. Com., 76 Pa. 319, 337 .....	12
Commonwealth vs. Beerson, 49 Pa. D. & C. 609 .....	12
Commonwealth ex rel. Billings vs. Ashe, 144 Pa. Super. 209 .....	9
Commonwealth ex rel. Cook vs. Ashe, 144 Pa. Super. 1	9
Commonwealth ex rel. Curtis vs. Ashe, 139 Pa. Super. 417 .....	9
Commonwealth vs. Delamater, 13 Pa. C. C. 152 .....	12
Commonwealth ex rel. Fitts vs. Smith, 158 Pa. Super. 105 .....	9
Commonwealth ex rel. McGlinn vs. Smith, 344 Pa. 41 .....	2, 8, 10
Commonwealth vs. Nayduch, 22 Pa. D. & C. 289 .....	12
Commonwealth vs. Rothensies, 64 Pa. Super. 895 .....	12



## INDEX

	PAGE
Commonwealth ex rel. Schultz vs. Smith, 139 Pa. Super. 357 .....	2
Commonwealth ex rel. Shaw vs. Smith, 147 Pa. Super. 423 .....	2, 9, 10, 11
Commonwealth ex rel. Uveges vs. Ashe, 161 Pa. Super. 58 .....	9
Commonwealth vs. Wilson, 134 Pa. Super: 222 .....	12
Commonwealth ex rel. Withers vs. Ashe, 350 Pa. 493 ..	9
McCullough vs. Commonwealth, 67 Pa. 30 .....	12

## ACTS OF ASSEMBLY

Act of March 22, 1907, P. L. 31—19 P. S. 784 .....	8
Act of June 24, 1939, P. L. 872, Sec. 628 C—18 P. S. 4628 C .....	6
Act of June 24, 1939, P. L. 872, Sec. 705—18 P. S. 4705 .....	2, 5, 6
Act of June 24, 1939, P. L. 872, Sec. 901—18 P. S. 4901 .....	2, 5, 6
Constitution of the United States:	
Sixth Amendment .....	8
Fourteenth Amendment .....	8
Constitution of Pennsylvania:	
Art. I, Sec. 9 .....	7

## APPENDIX

A. Townsend Confession .....	1a
B. Foulke Confession .....	4a
C. Keenan, Cain, Kopitsko, Jankowski Confession ....	7a
D. Petition to Indict Townsend as Fugitive .....	13a

**SUPREME COURT OF THE UNITED STATES.**

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**October Term, 1947.**

**No. 542.**

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**FRANK TOWNSEND,**

*Petitioner,*

**vs.**

**C. J. BURKE, Warden, Eastern State Penitentiary,**  
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
COMMONWEALTH OF PENNSYLVANIA.**

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**BRIEF FOR THE RESPONDENT.**

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**RESPONDENT'S STATEMENT OF THE CASE.**

The petitioner was a fugitive. Four (4) co-defendants, Keenan, Cain, Kopitsko and Jankowski, were arrested and signed a joint confession May 18, 1945 stating others were involved, but would not name them. A fifth co-defendant, Foulke, was arrested and signed a confession May 21, 1945 naming Townsend as involved. After, the five (5) co-defendants were held for court by a Magistrate; the District

### Statement of the Case

Attorney petitioned the Court of Quarter Sessions to be allowed to indict Townsend as a fugitive. It was granted. The Grand Jury found seven (7) indictments.

The petitioner was arrested June 3, 1945 and June 4, 1945 signed a confession voluntarily.

June 5, 1945, all six (6) defendants were arraigned. Pleas of guilty were made to two (2) robbery indictments and two (2) burglary indictments, and not guilty to one (1) robbery indictment, one (1) burglary indictment and one (1) indictment charging unlawfully carrying a concealed revolver and without a license. Three (3) places were burglarized, and robbery or attempted robbery was committed in each at the point of a gun or guns. All defendants had prior records; the petitioner's one of the longest:—seven (7) prior arrests and five (5) convictions beginning in 1930.

Counsel was not requested, and none assigned since it is only required in cases of murder.

*Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41;

*Commonwealth ex rel. Shaw v. Smith*, 147 Pa. Superior 423, overruling *Commonwealth ex rel. Schultz v. Smith*, 139 Pa. Superior 357.

The court sentenced the petitioner and his co-defendants after the facts of the two (2) burglary and robbery charges were told and the records of each examined.

The sentence for burglary is a fine not exceeding \$10,000.00, and for an indeterminate sentence, not exceeding 10 to 20 years. Act of June 24, 1939, P. L. 872, Sec. 901—18 P. S. 4901.

The sentence for robbery, as described in the indictments, is a fine not exceeding \$10,000.00, and for an indeterminate sentence, not exceeding 10 to 20 years. Act of June 24, 1939, P. L. 872, Sec. 705—18 P. S. 4705.

Under these four (4) indictments the defendants could

### *Summary of Argument*

have been sentenced to two (2) fines not exceeding \$10,000.00 each and two (2) indeterminate sentences, not exceeding 10 to 20 years each. One (1) sentence *only* may be imposed for each burglary-robbery.

Townsend, the petitioner, was sentenced to 10 to 20 years.

Cain was sentenced to 10 to 20 years.

Kapitsko was sentenced to 2½ to 5 years, to begin after serving his back parole time (2½ years) without commutation.

Foulke was sentenced to 7½ to 15 years.

Jankowski was sentenced to 7½ to 15 years.

The petitioner does not deny his guilt, does not want a new trial, but asks an absolute discharge because he has partly satisfied his sentence.

There is an appendix attached hereto of the following:

A. Confession of Townsend.

B. Confession of Foulke.

C. Joint Confession of Keenan, Cain, Kopitsko and Jankowski.

D. Petition of District Attorney to indict Townsend as a fugitive.

These papers were not introduced in evidence because of the pleas of guilty.

### **SUMMARY OF ARGUMENT.**

#### **I.**

#### *Indictments, Confessions and Pleas.*

The petitioner, with three others, was indicted for armed robbery (R. 31) and burglary (R. 43) of Wade Mitchell at

## *Summary of Argument*

1018 Passyunk Avenue, to which they confessed and plead guilty.

The petitioner, with two others, was indicted for attempted armed robbery (R. 38) of Velma Robley and with four others of burglary (R. 41) at 323 South 23rd Street, where Velma Robley was in charge, to which they confessed and plead guilty.

### II.

#### *Who are the defendants?*

The petitioner is 29 years old and the other five from 23 years to 30 years. They are all habitual criminals having prior convictions and sentences to prisons.

### III.

#### *Due Process of Law.*

There is no categorical right to counsel under the 14th Amendment to the Constitution of the United States, the Constitution of the Commonwealth of Pennsylvania or Laws of Pennsylvania, except in murder.

A defendant, who pleads guilty, does not have to be supplied counsel.

More defendants plead guilty than those convicted, either without a jury or by a jury.

To obtain a confession is lawful.

The indictments were understood by the petitioner and his co-defendants. They plead guilty to two (2) robbery-burglary crimes, to which they had confessed, and not guilty to the one (1) robbery-burglary crime, to which they did not confess, and of which they were acquitted.



## Argument

The petition for habeas corpus, prepared and filed by the petitioner himself, shows intelligence, resourcefulness and cunning.

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## ARGUMENT.

### I.

#### *Indictments, Confessions and Pleas.*

The indictments to which the petitioner plead guilty and was sentenced were drawn under the Act of June 24, 1939, P. L. 872, Sec. 705, 18 P. S. 4705.

"Whoever, being armed with an offensive weapon or instrument, robs or assaults with intent to rob another; or, together with one or more person or persons, robs or assaults with intent to rob; or robs any person, and at the same time, or immediately before or immediately after such robbery, beats, strikes, or ill-uses any person, or does violence to such person, is guilty of felony, and upon conviction, shall be sentenced to pay a fine not exceeding ten thousand dollars (\$10,000.00); or undergo imprisonment, by separate or solitary confinement at labor, not exceeding twenty (20) years, or both,"

and Sec. 901, 18 P. S. 4901:

"Whoever, at any time, wilfully and maliciously, enters any building, with intent to commit any felony therein, is guilty of burglary, a felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding ten thousand dollars (\$10,000.00), or to



### *Argument*

undergo imprisonment, by separate or solitary confinement at labor, not exceeding twenty (20) years, or both,"

and Sec. 628 C, 18 P. S. 4628C:

"In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a firearm, used or attempted to be used, and had no license to carry the same, shall be evidence of his intention to commit said crime of violence."

Indictment No. 696 of May sessions 1945 charges the petitioner and Joseph Kopitsko, Edward Keenan and Charles Cain with five (5) counts drawn under Sec. 705 and the sixth (6) count under Sec. 628.

Indictment No. 697 of May sessions 1945 charges the petitioner and Edward Keenan and Orville Foulke with four (4) counts drawn under Sec. 705 and the fifth (5) count under Sec. 628.

Indictment No. 698 of May sessions 1945 charges the petitioner and Edward Keenan and Orville Foulke with four (4) counts drawn under Sec. 705, and the last count under Sec. 628.

Indictment No. 699 of May sessions 1945 charges the petitioner and Edward Keenan, Joseph Kopitsko, Walter Janowski and Orville Foulke with one (1) count under Sec. 901.

Indictment No. 700 of May sessions 1945 charges the petitioner and Edward Keenan and Orville Foulke with one (1) count under Sec. 901.

Indictment No. 701 of May sessions 1945 charges the petitioner and Joseph Kopitsko, Edward Keenan and Charles Cain with one (1) count under Sec. 901.

The defendants, as charged, plead guilty to indictments Nos. 696, 698, 699 and 701.

## *Argument*

Indictments Nos. 699 and 701 involve Wade Mitchell and the premises 1018 East Passyunk Avenue.

Indictments Nos. 698 and 699 involve Velma Robley and the Yellow Cab Company at 323 South 23rd Street.

The confessions of all defendants (App. A. B. C.), tell of the burglary and robbery and attempted robbery at the garage at 1018 Passyunk Avenue and the Yellow Cab Company, 323 South 23rd Street.

## **II.**

### *Who are the defendants?*

The petitioner is 29 years of age, Foulke 30 years, Kopitsko 23 years, Cain 24 years, Keenan and Jankowski 25 years. All have many arrests, convictions and jail sentences.

These six (6) defendants are habitual criminals. They know legal procedure, know when to ask for counsel and when not to, know which judges are sitting and scheme to pick the judge before whom they will be tried. They know they are warring against society. One of their commonest schemes after sentence is to file petition after petition for writs of habeas corpus reiterating the same reasons in each petition; quoting the decisions of appellate courts, hoping that some court will weaken and let them out to go back to their life of crime and war against society.

## **III.**

### *Due Process of Law.*

Article I, Section 9 of the Constitution of Pennsylvania provides:

"Rights of accused in criminal prosecutions.

## Argument

"In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, \* \* \*"

Article VI of the Amendments of the Constitution of the United States provides:

"Rights of accused persons in criminal prosecutions.  
"In all criminal prosecutions, the accused \* \* \* shall have \* \* \* the Assistance of Counsel for his defence."

Article XIV of the Amendments of the Constitution of the United States provides:

"Section 1. Citizenship defined. Privileges of Citizens.

"\* \* \* nor shall any State deprive any person of life, liberty, or property, without due process of law; \* \* \*"

Article VI of the Amendments to the Constitution of the United States applies only to trials in federal courts. *Betts v. Brady*, 316 U. S. 455, 461.

That the "Accused should have a right to be heard by himself and by his counsel was adopted by Pa. in 1776 \* \* \*" *Betts v. Brady*, *supra* 465.

In most states the people, their representatives and courts, do not consider the appointment of counsel a fundamental right essential to a fair trial. *Betts v. Brady*, *supra* 471.

In Pennsylvania, by Act of Legislature, in murder cases—the only instance carrying the death penalty—counsel must be appointed.

Act of March 22, 1907, P. L. 31—19 P. S. 784.

In crimes other than murder, accused has a right to be heard by counsel, but it has never been the law that he must be supplied with counsel.

*Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41.

## Argument

9

McGlinn plead not guilty to charge of armed robbery.

*Affirmed Commonwealth ex rel. Withers v. Ashe*,  
350 Pa. 493, 495;

*Commonwealth ex rel. Fitts v. Smith*, 158 Pa.  
Super. 105.

It has been constantly held that when a defendant pleads guilty the court is not bound to appoint counsel to represent him.

*Com. ex rel. Curtis v. Ashe*, 139 Pa. Super. 417.

*Com. ex rel. Cook v. Ashe*, 144 Pa. Super. 1.

*Com. ex rel. Billings v. Ashe*, 144 Pa. Super. 209,  
211.

*Com. ex rel. Shaw v. Smith*, 147 Pa. Super. 423.

*Com. ex rel. Uveges v. Ashe*, 161 Pa. Super. 58, 61,  
62..

Each relator, in the cited cases, in his petition for discharge on habeas corpus, gave most of the following reasons as taken from these cases.

1. Did not have counsel.
2. Was not represented by counsel.
3. Was not informed of his right to counsel.
4. Trial judge did not ask if he wished counsel or informed him of his right to counsel.
5. Did not waive his constitutional right to be represented by counsel.

The petitioner before you gives as his reasons:

### Argument

- a. "He was not advised of his right to engage counsel."
- b. "He was not instructed of the particular offenses covering Bills Nos. 696, 698, 699 and 701, May Sessions 1945."
- c. "From the very minute of his arrest to the very minute of the imposition of sentence, at no time was your petitioner instructed to even the simplest and minutest degree of his constitutional rights provided under the 6th and the 14th amendments of the Constitution of the United States" (R. 3).

His reasons are the same as those considered in the cited cases. He does not assert his innocence. He who confesses his guilt prior to indictment and pleads guilty to indictments covering his confession cannot say he has been deprived of his constitutional rights. Could the petitioner truthfully allege innocence there might be reason for considering his petition.

*More plead guilty than are convicted by trial.*

During 1939-1940 in Pa.

37,221 defendants plead guilty.

10,755 defendants were convicted in cases where a jury trial was waived.

6,104 defendants were convicted by juries. These facts are obtained from the chief of the Census Bureau of the Department of Commerce and cited *Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41, 51.

Simply because without counsel, the defendant pleads guilty—is no reason to set aside the sentence. If this were so the courts would spend most of their time granting new trials. There must be a real reason.

*Commonwealth ex rel. Shaw v. Smith*, 147 Pa. Super. 423.



Shaw plead guilty; after sentence he filed a petition for habeas corpus alleging the following reasons:

1. Did not have counsel.
2. Was not informed of his right to counsel.
3. Trial judge did not ask if he wished counsel nor offer to appoint counsel.
4. Did not waive his constitutional right to be represented by counsel.

The Court in its decision said, p. 430:

"Our courts should not for the reasons offered in this petition turn loose upon society the hundreds of convicts who were sent to prison after *pleading guilty* or being adjudged guilty by a jury, unless the law imperatively requires them to do so, and there is no such requirement."

*Right of Police to question accused.*

It is argued that defendant was kept in custody, questioned and taken from the scene of one crime to another, which was serious misconduct on the part of the police. If police cannot do so, this means that confessions could never be obtained. To follow petitioner's argument it would mean that society would be the victim of criminal hordes who might never be questioned, who could never make a confession. Such an argument is unrealistic and should have no consideration.

Our courts would not follow any such idea.

*Commonwealth ex rel. Shaw v. Smith*, 147 Pa. Super. 423, 430, *supra*.



*Argument*

The complaint that the petitioner did not have a preliminary hearing before a Magistrate is the petitioner's own fault. He was a fugitive. Fugitives not only may be indicted, but must be indicted to toll the Statute of Limitations. All defendants in a particular case should be indicted at the same time. The indictment was properly found and the petitioner because of his flight cannot complain that he did not have a preliminary hearing.

Com. v. Nayduck, 22 Pa. D. & C. 289.

Com. v. Delamater, 13 Pa. C. C. 152.

Com. v. Wilson, 134 Pa. Super. 222.

Com. v. Beerson, 49 Pa. D. & C. 609.

Brown v. Com., 76 Pa. 319, 337.

Com. v. Rothensies, 64 Pa. Super. 395, 416.

McCullough v. Com., 67 Pa. 30.

*Alleged Complexity of charges.*

The charges against the petitioner and his five (5) co-defendants are quite simple, easily understood, and were understood by the six (6) defendants.

691 charged petitioner alone with carrying a revolver to which he plead not guilty.

696 charged petitioner and others with robbery to which they plead guilty.

697 charged petitioner and others with robbery to which they plead not guilty.

698 charged petitioner and others with robbery to which they plead guilty.

699 charged petitioner and others with burglary to which they plead guilty.

700 charged petitioner and others with burglary to which they plead not guilty.

701 charged petitioner and others with burglary to which they plead guilty.

*Argument*

The petitioner and his co-defendants were able to discriminate as to their pleas.

Bills Nos. 696 and 701 charge Robbery of Wade Mitchell and Burglary of 1018 Passyunk Avenue where Mitchell was night watchman. The defendants had prior to pleading signed confessions admitting these crimes, App. A. & C.

Bills Nos. 698 and 699 charge attempted Robbery of Velma Robley and Burglary of the Yellow Cap Company, 323 South 23rd Street. The defendants had prior to pleading signed confessions admitting these crimes, App. A. B. & C.

Bills Nos. 697 and 700 charge Robbery of Renfroen and Burglary of N. E. corner of 27th and Brown Streets, where Renfroen was caretaker. The defendants did not admit to this except Foulke who said he was outside. They were tried and acquitted on these two bills.

To say that the petitioner did not understand to what he was pleading is most certainly not substantiated by a single fact. To that which he plead Not Guilty he was acquitted. To that which he plead Guilty he does not deny guilt.

His petition for habeas corpus, self prepared and filed, shows intelligence and resourcefulness. He tells of being taken from the scene of one crime to another—the station houses were the police districts where the crimes were committed; he does not tell he confessed; he says he did not have counsel; he does not say he asked for counsel; he says he did not know of his right to employ his own lawyer; he does not claim innocence; he does not ask for a new trial; he does not want a new trial, but he asks to be discharged. He claims had he had counsel he might have gotten a lesser sentence because one of his co-defendants did; he does not tell of the difference between his and that one's criminal records; he does not say what counsel could have said or proved to obtain a lesser sentence. The petition is expressed in well-chosen words, is intelligent, resourceful and cunning; the cunning of an habitual criminal.

*Death penalty cases not discussed.*

We have not discussed those cases cited for the petitioner which involve the death penalty. We do not believe they have anything to do with this case which is not subject to the death penalty. In Pennsylvania the only crime, murder, subject to death penalty, counsel must be provided by act of legislature, not by Constitutional Provision.

The conclusion of the argument for the petitioner does not claim that counsel must be appointed in all serious criminal cases and does not attack the validity of sentence passed upon pleas of guilty without counsel being offered or requested. It rests the contention on the proposition that the defendant cannot comprehend the charges made and cannot intelligently respond to them. A reading of his confession and of the confessions of his co-partners in crime clearly show that these habitual criminals knew and understood perfectly that they were committing deliberately and carefully planned crimes. In the garage at Passyunk Avenue they had stolen some welding equipment in order to burn the safe. They went there armed. They took the welding equipment with them. They forced the garage attendant away from the office, holding him prisoner at the point of a gun. When the welding equipment did not work, the combination was broken off the safe and they escaped by stealing an automobile from the garage. The holdup of the Yellow Cab Company, where some went by trolley car and the rest in a stolen automobile used for the getaway, lining up the cashier and others against the wall, the attempt to break open what they thought was a wooden box, but which turned out to be a safe, shows the carefully planned crime.

The petitioner does not claim that he was subject to the "third degree" or that he is innocent.

His contention is that since counsel was not supplied to him, he must now, having partly satisfied his sentence, be

*Argument*

set-free; that to grant a new trial would be destructive of justice.

He, an habitual criminal for fifteen (15) years prior to this arrest, admits his guilt in two premeditated crimes of robbery and burglary, but asks this Court to set him free. To free this guilty criminal, the court would forget its first duty to protect the citizenry. To free this guilty criminal is notice to the criminal world, that it has won the war against law and order; that courts have bowed to crime rampant.

The judgment of the Supreme Court of Pennsylvania should be affirmed.

FRANKLIN E. BARR,

*First Assistant District Attorney.*

JOHN H. MAURER,

*District Attorney.*



75



**APPENDIX "A."**

**DEPARTMENT OF PUBLIC SAFETY.  
BUREAU OF POLICE  
PHILA., Pa.**

**FIRST DETECTIVE DIVISION  
15th and Snyder Avenue.**

**Mon. June 4, 1945 3 P. M.**

**STATEMENT OF: FRANK SULLIVAN TOWNSEND, W-  
29 ("Frank")**

**1732 Wylie Street, Philadelphia, Pa.**

**Concerning: Crimes mentioned in this statement.**

**Record: Statement taken at the 1st Detective Division  
headquarters, 15th St. and Snyder Ave., on Monday,  
June 4, 1945, at 3 p. m.**

**Stenographer, Robert Prado, clerk of the 1st Det. Div.**

**Taken in presence of: Detectives, 1st Detective Division.**

- 1. Hicks #142, E. J.**
- 2. Kelly #198, J. A.**
- 3. Lear #13, L. J.**

**Interrogation by: Detective Patrick J. Lane, #83, 1st Det.  
Div.**



## BY DETECTIVE LANE #83:

Q. What is your name, age, and address?

A. Frank Sullivan Townsend. They call me "Frank." I'm twenty-nine. I live at 1732 Wylie Street.

Q. "Frank," we're going to take a statement from you, which you understand, you are making of your own free will. No threats or promises are being made to you to get you to make this statement; and you are being warned that anything you say concerning you yourself in this statement maybe used as evidence against you at the time of your trial in court. Do you understand that, and are you willing to make a statement.

A. Yes, sir.

Q. On March 18, 1945, between one and six o'clock in the morning, a taproom at 5019 North Broad St. owned by a Eugene Mahlineister, was broken into. Do you know anything about that.

A. Yes. Well the three of us went in there: me, "Klik" — Joseph Kopitsko —, and Eddie Keenan. We broke a window and entered the place. We got there on the subway and got off at Logan Station. We pulled down the top window, which wasn't locked. And we opened the side door. We looked around and went in the office and saw a safe. We figured all the money was in there. We didn't touch nothing, but went out and closed the door and the window and got a car and took the safe out to a lot at 24th and Fairmount and took the screws out of the safe. We got \$1150 cash. We also got three revolvers out of the place. I have one. And the other two I threw in the Schuylkill River, at the Dam, Spring Garden Bridge.

FIRST DETECTIVE DIVISION  
15th St. and Snyder Ave.  
Phila., Pa.

STATEMENT OF FRANK S. TOWNSEND, 6-4-45, 3 P. M.

Q. Did you take anything else there.

A. And about four cartons of cigarettes and two cases of whiskey, assorted brands. Also three Coast Guard shirts. I'm now wearing one of them.

---

Q. Now, on the night of March 23, 1945, there was a truck loaded with welding equipment that was stolen from a garage, 1627 Brandywine Street. What do you know about that.

A. The first I seen that truck was down at the garage, 1018 Passyunk Avenue. We had planned to meet. I met Kopitsko and Keenan and Cain. I stayed outside. The others went inside the garage. They pulled the truck inside the big doors and closed the big doors. Then I took the burning equipment off the truck. I was going to burn the safe. But I couldn't make the equipment work. Then I knocked the combination off the safe. When I seen that I couldn't make use of the burning equipment, and we saw there was no use hanging around there, we picked a car out of the garage and went out the Eighth Street side of the building. And we later abandoned it on Ninth Street, around Lombard.

---

Q. On April 29, 1945, around 11.45 p. m. the Yellow Cab Co. office and garage, 323 S. 23rd St. was held up at a point of gun. Do you know anything about that.

A. Yes. I was there. On that job there was me, and Keenan, and Kopitsko, and "Wash"—Jankowski, and Reds. We went down to the garage on a trolley. Me and Reds and Jankowski waited in the square, 23rd and Pine, for Kopitsko

## Appendix "B"

and Keenan, who went down and got an automobile from a public garage, 6th and Reed. Then I got in the car with the rest of them and drove into the garage. There was a colored girl in the office, and there was a colored mechanic, and one cab driver. We got them all together and put them in the office. We saw what looked like a wooden box and we tried to break it open, but we found out it was an iron safe. We gave up, and didn't get anything out of there.

Q. Are there any other jobs you were on that you want to tell us about at this time.

A. That's all. I was on a job at 24th and Fairmount, for which I have been indicted.

Q. Is what you have said in this statement, the truth.

A. Yes, sir.

(SIGNED) Frank Townsend  
1732 Wylie Street

WITNESS

(SIGNED) Patrick J. Lane #83.

## APPENDIX "B."

DEPARTMENT OF PUBLIC SAFETY.  
BUREAU OF POLICE  
Philadelphia.

Detective Division  
15th & Snyder Ave.

May 21, 1945, 5 P. M.

STATEMENT OF: ORVILLE FOULKE (nickname "Reds")  
White, 30, residence 2222 Aspen St., Phila., Pa.

Concerning: Crimes mentioned in this statement.

## Appendix "B"

Record: Statement taken at the 1st Detective Division headquarters, 15th St. and Snyder Ave., Phila., Pa. on Monday, May 21, 1945, at 5 p. m. Stenographer, Robert Prado, clerk of the 1st Detective Division.

Taken in the presence of: Detectives Louis J. Lear #13, Edward J. Hicks, #140; James A. Kelly, #198, of the First Detective Division.

Interrogation by: Detective Patrick J. Lane, #83, 1st Detective Division.

BY DETECTIVE LANE #83:

Q. What is your name, age, and address?

A. Orville Foulke. They call me "Reds." I'm thirty. I live at 2222 Aspen Street.

Q. "Reds," we're going to take a statement from you, which you are making of your own free will. No threats or promises are being made to you to get you to make this statement; and you are being warned that anything you say in this statement concerning you yourself, may be used as evidence against you at the time of your trial in court. Do you understand that, and if so, are you willing to make a statement?

A. Yes, sir.

FIRST DETECTIVE DIVISION  
15th St. and Snyder Ave.  
Philadelphia, Pa.

STATEMENT OF ORVILLE FOULKE, 5-21-45, 5 p. m.

Q. Now, on April 29, 1945, about 11:45 P. M. the Yellow Cab Company office and garage located at 323 S. 23rd St.,



## Appendix "B"

was held up at the point of gun and attempted safe robbery was made. What do you know about that job?

A. Only that I was on it.

Q. Who else was with you on that job.

A. There was a few guys with me. I was half drunked up. There was five of us; me, Jankowski, Kopitsko, Keenan, and Townsend. I was standing at the door of the office to keep the three people covered. I didn't have a revolver. I didn't have nothing.

Q. Where did you all meet before you went out to the Yellow Cab place?

A. The other four met me at the corner of 16th and Fairmount Avenue, in an automobile. We went from there to the Yellow Cab Garage, 23rd and Pine. When we got there, I was at the office to cover the three employees; that is, to watch them. They were in the office.

Q. I am showing you this picture (Misc. 7.049 5-18-45 Bur. Police Phila. Pa.) who are these men?

A. That's Jankowski, Kopitsko, Keenan, and Cain.

Q. Are they the four others?

A. Jankowski, Kopitsko, and Keenan are three of the four that were with me at the Yellow Cab place, 23rd and Pine. The other, Cain, wasn't. The fourth one on that was Townsend: Frankie.

Q. Well, did you get anything out of that Yellow Cab place?

A. No. And I just stood outside the door to watch the three employees. The others tried to open the safe, but couldn't. So we left in the same car that we came in.

Q. No, on March 29, 1945, 11.10 p. m., there was a garage at the north-east corner of 27th and Brown where the attendant was held up at point of gun and an automobile stolen. Were you in on that?

A. Yes. Keenan and Townsend were with me.

Q. How many of you had revolvers?

A. All of us.

Q. Was the attendant robbed?

Appendix "C"

7a

A. Most likely he was. I was outside the door and the other two came out with an automobile.

Q. Did you know that the attendant had been held up and robbed?

A. Not till after the other two came out.

Q. Is this all, and is what you've said here, the truth.

A. Yes, sir.

(SIGNED) Orville Foulke  
(RES) 2222 Aspen St.

WITNESSES

(SIGNED) Patrick J. Lane #83.

APPENDIX "C."

DEPARTMENT OF PUBLIC SAFETY.  
BUREAU OF POLICE  
PHILA., PENNA.

FIRST DETECTIVE DIVISION  
15th and Snyder Avenue

3.00 P. M., May 18, 1945 (Friday)

JOINT STATEMENT OF:

- (1) EDWARD KEENAN, W-25, 1622 Carlton Street;
- (2) CHARLES CAIN, W-24, 1732 Wylie Street;
- (3) JOSEPH KOPITSKO, W-23, 311 Tasker Street;
- (4) WALTER JANKOWSKI, W-25, 1607 Mt. Vernon St.

Concerning: (Crimes mentioned in this statement).

Record: Statement taken at the First Detective Division Headquarters, 15th St. and Snyder Ave., Phila., Pa., on Friday, May 18, 1945, at 3.00 P. M. Stenographer, Robert Prado, clerk of the First Detective Division.



## Appendix "C"

Interrogation By: Detective Patrick J. Lane, No. 83, of the  
First Detective Division.

## TAKEN IN THE PRESENCE OF:

- 1—Detective Edward J. Hicks, No. 142, 1st Det. Div.
- 2—Detective Louis J. Lear, No. 13, 1st Det. Div.
- 3—Detective James A. Kelly, No. 198, 1st Det. Div.

BY DETECTIVE LANE, No. 83:

Q. What are your names, ages, and residence addresses?

A. Edward Keenan, twenty-five, 1622 Carlton Street.

A. Charles Cain, twenty-four, 1732 Wylie Street.

A. Joseph Kopitsko, twenty-three, 311 Tasker Street.

A. Walter Jankowski, twenty-five, 1607 Mount Vernon Street.

Q. We're going to take a statement from you, which you are making of your own free will. No threats or promises are being made to you to get you to make this statement; and you are being warned that anything you say in this statement concerning you yourselves, may be used as evidence against you at the time of your trial in court. Do you understand that, and if so, are you willing to make a statement?

A. (by each) Yes.

FIRST DETECTIVE DIVISION

15th St. and Snyder Ave.,

Philadelphia, Pa.

JOINT STATEMENT OF EDWARD KEENAN, et al., 5-18-45—3.00 P. M.

Q. Now, one of you start it off. On March 18, 1945, between 1 A. M. and 6.00 A. M. a taproom was broken into

Appendix "C"

2a

at 5019 North Broad Street, owned by one Eugene Mahlemeister, who resides at 1429 W. Cayuga Street, so we can start with that job.

A. (By Cain) I wasn't in on that job.

A. (By Keenan) Me and Joe Kopitsko done that job.

Q. How did you get in there, and what did you do when you got in there?

A. (By Keenan) We—that is, me and Joe Kopitsko—that night, took the subway at Broad and Fairmount Avenue and rode up to Logan Station and, with another fellow—I don't want to mention his name—we pulled the top of the window down. The bottom was locked. The top wasn't. We got in there and we looked around for money. So we found a little office where everything was at. So we took the safe out of the building. We left and I got a machine. I took it without the owner's permission. He's more or less a friend of mine. He didn't know I took it. So we came back and got the safe and took it down to the lot 24th and Fairmount. And we took the screws out of the back and opened the safe. We got about \$1150 and that was in the safe, in cash. We also took out of there, two revolvers, and an antique revolver, which we threw away in the Schuylkill River. We also took some coast guard shirts—three of them.

Q. What did you do with the revolvers you got there?

A. (By Keenan) That's the ones we were using.

Q. Showing you this revolver.

Is this one that was stolen there?

A. (By Kopitsko) Yes.

Q. What became of the other revolvers?

A. (By Keenan) We threw the antique in the river, and the other one, I ain't got it.

Q. Did you take any liquor out of there?

A. (By Keenan) Three bottles, for our own use.

Q. You're sure you didn't take any more liquor than just those three bottles?

A. (By Keenan) That's right.

Q. On the night of March 23, there was an automobile stolen from a garage, 1627 Brandywine Street, owned by Morris Coyle. Who know anything about that?

A. (By Kopitsko) I got the truck out.

Q. How did you get in there?

A. (By Kopitsko) Broke a panel in the large door.

Q. Who was with you on that job?

A. (Kopitsko) Nobody was with me when I got the truck. It contained commercial welding equipment. Well, there was another fellow with me, but I don't care to mention his name.

Q. Well, what did you do?

A. (By Kopitsko) We drove down with the truck to the garage on 6th Street (1018 E. Passyunk Ave., owned by Joseph Rizzo). That's all for me.

A. (By Keenan) Pre-arranged, I met Joe Kopitsko and Charlie.

A. (By Cain) We walked up to the door, Eddie Keenan and I. We both had guns. Eddie had one, and I had one. The door was locked. I knocked on the door. The colored fellow came to the door. We asked him could we use his toilet. We walked in and pulled the guns on him—the both of us. We marched him to the back of the garage and put him in a car. I stayed in the rear of the garage, watching him.

A. (By Keenan) Then I let them come in with the truck. The garage door was open. Then Joe Kopitsko drove the welding truck in. And I closed the door. Then the equipment we had was no good to us. We couldn't get the torch lit as the air valve locked. I was going to try to burn into the safe which was in the front office. So we found a small sledge there. We tried to drive a pin through but that wasn't no good, either. So we left.

Q. When you failed to enter the safe, what did you do then?

A. (By Keenan) So we got the Buick Sedan, 1941 model, 2 ton, black body, gray top, Pa. Lic. C-4757. We went out

on the 8th St. side of the garage. All of us got in the car. Me and Charlie and Joe we went a couple of blocks, just far enough to get out of there. We parked it on 9th Street around Lombard Street. We left the colored man in the car.

Q. On April 29, 1945, 11.45 P. M. the Yellow Cab Office and garage located at 323 S. 23rd St. was held up at the point of gun, and attempt robbery of a safe there, was made. Who knows anything about that job?

A. (By Keenan) That's his, too (indicating Walter Jankowski). That was us three,—me, Joe Kopitsko, and Walter Jankowski. And some others, too. I don't want to mention their names. They were in on that, too. We met near the garage. That wasn't pre-arranged; it was a "beat up" affair: it came up just on the spur of the moment. We went to the garage, 6th and Reed. So we pushed a car out of there. We got into it and we shot into the Yellow Cab place. By the way, that a public garage, 6th and Reed. I was driving. I drove to the Yellow Cab Garage, 23rd and Pine. All of us drove in. There was a cab driver there. So we took over. Joe Kopitsko and Walter Jankowski had a gun. There was only one girl in the office, a colored girl. So we told them to all go in the office.

KOPITSKO: We told them to stand up against the wall. Something like that.

A. (Continued by Keenan) So me and Jankowski was in the back office. It looked like a wooden box. There's a big sledge there. I picked it up and hit the safe. But it didn't budge the safe. It's a safe with a wooden casing on it. I said "Fuck this, I'm going to see what it looks like on the other side." I walked around and seen that big old thing. And I said, "Come on, Frank, we're wasting our time." So that's all. We didn't break no combination or nothing.

Q. On the night of May 10, 1945, a taproom was broken into and burglarized at 1500 Callowhill Street. Who know anything about that?



## Appendix "C"

A. (By Keenan) Me and Charlie Cain done that. My wife lives down that way I was going down that way. Me and Charlie had been drinking. We were drunk, so I stuck my foot through the window and reached in and turned the knob. So the other door was locked, too. I stuck my foot in, too. I got my foot cut. When I got near the bar, the burglar alarm went off. I grabbed four bottles of liquor. One had this much (indicating); the most had about this much (indicating). It was on the bar. So that's all we took.

Q. What about the job that was committed in Whitemarsh?

A. (By Keenan) We started out from 16th and Fairmount. Right around the corner there's a garage. That's on 16th Street, right off Fairmount Ave. We pushed a car out of there, and started out. I got in the car, and Charlie Cain, and somebody else. I don't want to mention the name. And we drove up to Whitemarsh. We entered through the back window. I guess we got about two cases of whiskey. That's all we took.

Q. Is there anything else you boys have to say, now?

A. (By each) No.

Q. Is everything you've said here, the truth?

A. (By each) Yes.

SIGNED Edw. J. Keenan

RES. 1622 Carlton Street

SIGNED Charles A. Cain

RES. 1732 Wylie Street

SIGNED Joseph Kopitsko

RES. 311 Tasker Street

SIGNED Walter Jankowski

RES. 1607 Mt. Vernon St.

## WITNESSES:

Det. Edward J. Hicks, No. 142.

Det. Patrick J. Lane, No. 83.

Det. James A. Kelly, No. 198.

Det. Louis Lear, No. 13.



## APPENDIX "D."

## PETITION FOR LEAVE TO INDICT FUGITIVE.

IN THE  
COURT OF QUARTER SESSIONS OF THE PEACE.  
FOR THE COUNTY OF PHILADELPHIA.

MAY SESSIONS, 1945.

COMMONWEALTH OF PENNSYLVANIA,

vs.

FRANK TOWNSEND, Fugitive.

Sur Charge of:  
Burglary with Intent to  
Rob.  
Attempted Robbery, While  
Armed with Others.  
Burglary.  
Receiving Stolen Goods.

In re application of the District Attorney of the County of Philadelphia, for leave to prefer bill of indictment to the Grand Jury against the above named defendant, fugitive from justice, upon the facts contained and set forth in the following affidavit: together with one Edward Keenan, Joseph Kopitsko, Walter Jankowski, Orville Foulke and Charles Cain.

State of Pennsylvania  
City and County of Philadelphia } ss.

Patrick Lane, being duly sworn according to law doth depose and say, That he is a detective of the Department of Public Safety of said City of Philadelphia and that the facts hereinafter set forth are true and correct, from infor-

## Appendix "D"

mation received by and investigation made by him and to the best of his knowledge and belief.

Deponent avers that Frank Townsend, above named, together with one Joseph Kopitsko, Edward Keenan and Charles Cain, on the 24th day of March, A. D. 1945, with force and arms, did feloniously and burglariously enter the garage of one Joseph Rizzo with intent to commit a felony, and then and there feloniously and violently to rob, seize, steal, take and carry away certain of the property in the presence and against the will of one Wade Mitchell therein then being found; and then and there, did feloniously and violently make an assault upon said Wade Mitchell therein then being found, and him in bodily fear and danger of his life then and there feloniously to put, and in the presence and against the will of said Wade Mitchell, the sum of \$3,000.00 did unlawfully attempt to feloniously rob, seize, steal, take and carry away; and a Buick sedan automobile, of the value of \$1700.00, did feloniously and violently rob, seize, steal, take and carry away.

Deponent further avers that Frank Townsend, above named, together with one Edward Keenan and Orville Foulke, on the 30th day of March, A. D. 1945, at the County aforesaid, did feloniously and burglariously enter the certain garage of one Benjamin Wang with intent to commit a felony, to wit, with an intent to make an assault upon one James Renfroein therein then being found, and the said James Renfroein in bodily fear and danger of his life to put from the person and in the presence and against the will of said James Renfroein certain moneys and property of and belonging to said James Renfroein, feloniously and violently to rob, seize, steal, take and carry away, and then and there, in the presence and against the will of said James Renfroein, a certain Buick sedan automobile, of the value of \$1500.00 and from the person and against the will of said James Renfroein, one wallet and the sum of five dollars, in lawful money of the United States, of the property of said James Renfroein, did then and there feloniously and violently rob, seize, steal, take and carry away.

## Appendix "D"

Deponent further avers that Frank Townsend, above named, together with one Edward Keenan, Joseph Kopitsko, Walter Jankowski and Orville Foulke, with force and arms, etc., and in the County aforesaid, on the 29th day of April, A. D. 1945, did feloniously and burglariously enter the garage of a certain body corporate named and called the Yellow Cab Company with intent to commit a felony, to wit, with intent to make an assault upon one Velma Mobley therein then being found, and said Velma Mobley in bodily fear and danger of her life to unlawfully put, and then and there in the presence and against the will of the said Velma Mobley, the sum of \$3000.00, in lawful money of the United States, of the property of said corporation named The Yellow Cab Company, to feloniously and violently rob, seize, steal, take and carry away.

Deponent further avers that immediately after the commission of said felonies and robberies, to wit, on or about the eighteenth day of May, A. D. 1945, the said Frank Townsend fled from the City and County of Philadelphia and Commonwealth of Pennsylvania, and is now concealing himself from arrest, and that ever since said flight he has been and is now such a fugitive.

Deponent further avers that he procured a warrant for the arrest of the said Frank Townsend for the commission of said felonies and robberies hereinabove set forth to be issued by Magistrate John J. O'Malley of the City of Philadelphia, on the 1st day of June, A. D. 1945, which warrant has not been served and executed because of said flight of said Frank Townsend as aforesaid; and further deponent saith not.

DET. PATRICK J. LANE, No. 83.

Sworn to and subscribed before me this 1st day of June, A. D. 1945.

JAMES DOUGHERTY,  
Notary Public.

My Commission Expires March 15, 1947.

## Appendix "D"

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

And now, June 1, 1945, John H. Maurer, District Attorney of the County of Philadelphia, on behalf of the said Commonwealth, asks that leave of the Court be granted him to prefer a bill of indictment against the above-named fugitive, to the Grand Jury charging said fugitive with the offences set forth in the foregoing affidavit.

JOHN H. MAURER,  
District Attorney.

COURT OF QUARTER SESSIONS

MAY SESSIONS, 1945.

COMMONWEALTH

vs.

FRANK TOWNSEND,

Fugitive.

Sur Charge of:

Burglary.

Receiving Stolen Goods.

Burglary with Intent to Rob.

Robbery, While Armed, To-

gether with Other Persons.

Violation of Uniform Fire-  
arm Act.

AND NOW, June 1, 1945, upon consideration of the within affidavit and of the application and request of the District Attorney, leave is hereby granted to prefer to the Grand Jury bill of indictment against the above named fugitive, charging said fugitive with the within described offence, together with one Edward Keenan, Orville Foulke, Joseph Kopitsko, Walter Jankowski and Charles Cain.

FLOOD,  
Judge.



# SUPREME COURT OF THE UNITED STATES

No. 542.—OCTOBER TERM, 1947.

Frank Townsend, Petitioner,	} On Writ of Certiorari to
v.	
C. J. Burke, Warden, Eastern	} the Commonwealth of
State Penitentiary.	

[June 14, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Commonwealth of Pennsylvania holds petitioner prisoner under two indeterminate sentences, not exceeding 10 to 20 years, upon a plea of guilty to burglary and robbery. On review here of the State Supreme Court's denial of *habeas corpus*,<sup>1</sup> the prisoner demands a discharge by this Court on federal constitutional grounds.

Petitioner, while a fugitive, was indicted on June 1, 1945, for burglary and armed robbery. Four of his alleged accomplices had been arrested on May 18, 1945, and signed a joint confession, while a fifth had been arrested on May 21, 1945, and had also confessed. Petitioner was arrested on June 3, 1945, and confessed on June 4. On June 5, after pleading guilty to two charges of robbery and two charges of burglary and not guilty to other charges, he was sentenced.

Petitioner now alleges violation of his constitutional rights in that, except for a ten-minute conversation with his wife, he was held incommunicado for a period of 40

<sup>1</sup> Respondent raised no procedural or jurisdictional issues in this Court or in the State Supreme Court. Since petitioner has throughout based his claim for relief solely on alleged deprivation of federal constitutional rights, we assume that those questions were considered by the Supreme Court of Pennsylvania and are therefore open here. *Herndon v. Lowry*, 301 U. S. 242, 247.



hours between his arrest and his plea of guilty. He does not allege that he was beaten, misused, threatened or intimidated, but only that he was held for that period and was several times interrogated. He does not allege that the questioning was continuous or that it had any coercive effect.

The plea for relief because he was detained, as he claims, unlawfully is based on *McNabb v. United States*, 318 U. S. 332. But the rule there applied was one against use of confessions obtained during illegal detention and it was limited to federal courts, to which it was applied by virtue of our supervisory power. In this present case no confession was used because the plea of guilty in open court dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it induced the plea.

Petitioner also relies on *Haley v. Ohio*, 332 U. S. 596, in which this Court reversed a state court murder conviction because it was believed to have been based on a confession wrung from an uncounseled 15-year-old boy held incommunicado during questioning by relays of police for several hours late at night. Even aside from the differing facts, that case provides no precedent for relief to this prisoner since, as has been said, no confession was used against him, and he does not allege that his pleas of guilty resulted from his allegedly illegal detention.

Petitioner also says that when he was brought into court to plead, he was not represented by counsel, offered assignment of counsel, advised of his right to counsel or instructed with particularity as to the nature of the crimes with which he was charged. This, he says, under the circumstances deprived his conviction and sentence

of constitutional validity by reason of the due process clause of the Fourteenth Amendment.<sup>2</sup>

Only recently a majority of this Court reaffirmed that the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital case from an uncounseled defendant. *Bute v. Illinois*, 333 U. S. 640. In that, and in earlier cases, we have indicated, however, that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process.

The proceedings as to this petitioner, following his plea of guilty, consisted of a recital by an officer of details of the crimes to which petitioner and others had pleaded guilty and of the following action by the court: [Italics supplied].

"By the Court (addressing Townsend):

"Q. Townsend, how old are you?

"A. 29.

"Q. You have been here before, haven't you?

"A. Yes, sir.

"Q. 1933, larceny of automobile. 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. 1938, entering to steal and larceny in Doylestown. Were you tried up there? No, no. Arrested in Doylestown. That was up on Ger-

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<sup>2</sup> The Supreme Court of Pennsylvania has frequently held that the state constitutional provision according defendants the right to be heard by counsel does not require appointment of counsel in non-capital cases. See, for example, *Commonwealth ex rel. McGlenn v. Smith*, 344 Pa. 46; *Commonwealth ex rel. Withers v. Ashe*, 350 Pa. 493. See also *Betts v. Brady*, 316 U. S. 455, 465. The Pennsylvania statutes require only that destitute defendants accused of murder shall be assigned counsel. Act of March 22, 1907, 19 Pa. Stat. Ann. § 784.

mantown Avenue, wasn't it? You robbed a paint store.

"A. No. That was my brother.

"Q. You were tried for it, weren't you?

"A. Yes, but I was not guilty.

"Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother too?

"A. No.

"Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

"The Court: Ten to twenty in the Penitentiary."

The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by

## TOWNSEND v. BURKE.

5

lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of *habeas corpus*. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

*Reversed.*

THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE BURTON, dissent.